# In the Supreme Court of the United States

OCTOBER TERM, 1963.

Nos. 489 & 490.

HUDSON DISTRIBUTORS, INC.,
*Appellant,*
v.
THE UPJOHN COMPANY,
*Appellee,*
and
HUDSON DISTRIBUTORS, INC.,
*Appellant,*
v.
ELI LILLY AND COMPANY,
*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF OHIO.

**BRIEF AMICUS CURIAE ON BEHALF OF THE OHIO HARDWARE ASSOCIATION, THE CLEVELAND ACADEMY OF PHARMACY, OHIO RETAIL FOOD DEALERS, OHIO ASSOCIATION OF TOBACCO DISTRIBUTORS, OHIO RETAIL JEWELERS ASSOCIATION, THE OHIO STATE PHARMACEUTICAL ASSOCIATION and THE OHIO SMALL BUSINESS COMMITTEE.**

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## TABLE OF CONTENTS.

## TABLE OF AUTHORITIES.

### Cases.

**Constitution.**



**Statutes.**

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## I. INTRODUCTION AND INTEREST OF AMICUS CURIAE.

This brief is presented with the written consent of all the parties to both the above-numbered causes under Rule 42 of the Court which are filed with this Court with this brief. A single brief is presented in both cases because

the only questions raised and considered by the lower courts are substantially the same in both cases. This brief is presented on behalf of a variety of retail associations listed above and the literally thousands of small independent merchants who comprise the membership in these various associations. These same associations presented a brief when this matter was before the Court of Appeals of Cuyahoga County on appeal from the initial Common Pleas Court decision and again before the Supreme Court of Ohio when the case was on appeal from the Court of Appeals of Cuyahoga County. Each of these associations had initially desired to present independent briefs but recognizing the practical problem faced by this already over-burdened Court in being deluged by a plethora of briefs in a case involving the public significance that the instant appeals do, these associations have combined to present their views in one brief to this Court as they did to the court below. (Record references throughout this brief will be referred to in the Upjohn case, No. 489, as RU, p. ----, and in the Lilly case, No. 490, as RL, p. ----.)

It is not the purpose of this brief to discuss in detail all of the various technical niceties which may or may not be presented by the Statements of Jurisdiction by the appellant in these cases, since it is felt that those can and will be handled with great competence by counsel for the two appellees. Rather, the basic function of this brief is conceived as an attempt to relate to the Court, from the standpoint of the small independent retail merchant, the social and economic problems (particularly as those problems involve the plight of the small independent retailers) which were presented to the 103rd General Assembly of the State of Ohio at the time of the enactment of Ohio Revised Code Sections 1333.27 through 1333.34,

the considerations which motivated the Ohio Legislature in adopting those sections—the so-called new Ohio Fair Trade Act—and how the General Assembly of Ohio sought successfully to solve those social and economic problems within the framework of the Federal Constitution and the exemptions granted to the states under the so-called Sherman Antitrust Act, Title 15 U. S. C., Sec. 1 et seq., by the so-called Miller-Tydings Fair Trade Act which is contained in Title 15 U. S. C., Sec. 1, and by the so-called McGuire Fair Trade Act, Title 15 U. S. C., Sec. 45. Presumably, the only matters of concern to this Court are whether the Legislature of Ohio in its solution to those problems *in the context of the facts presented by these particular appeals* in some way ran afoul of either a provision of the United States Constitution or of the Miller-Tydings and McGuire exemptions to the operation of the Sherman Act. It is submitted that such was not the case.

## II. STATEMENT.

These cases both represent appeals from the Supreme Court of Ohio sustaining an opinion by the Court of Appeals for the Eighth Appellate District of Ohio upholding the constitutionality of the so-called new Ohio Fair Trade Act on the facts which were before those courts. The entire history of these cases and their exact present posture before this Court is not repeated here as it has been presented with great clarity and precision by counsel for the appellees herein. This brief is presented in support of the appellees' position.

## III. QUESTIONS PRESENTED.

1. Are Sections 1333.27 through 1333.34 of the Ohio Revised Code (the new Ohio Fair Trade Act) as applied to the facts of these cases repugnant to any provisions of the United States Constitution?

2. Were those same sections, as applied to these facts, within the permissible ambit afforded to the states by the enabling legislation of the so-called Miller-Tydings and McGuire Acts (Title 15 U. S. C., §§ 1, 45) which provided certain exemptions from the Federal antitrust laws for state fair trade laws?

## IV. SUMMARY OF ARGUMENT.

1. The Ohio Legislature enacted its Fair Trade Law in 1959 by overwhelming majorities in both branches of the State Legislature. The Legislature was motivated in large measure by its desire to preserve from unfair acts of competition the independent retail merchants who constitute a tremendously significant part of Ohio's commercial marketplace. The Legislature found on the basis of extensive evidence presented to it that the independent retail merchant was a victim of usage by price discounters of a manufacturer's trademark or trade name as bait in order to draw customers into the store of the discounter.

2. The legal basis upon which the Ohio Legislature acted was its recognition that property rights exist and have for a long time existed in trademarks and trade names and that these property rights remain with the owner thereof even after the commodities with which they are used have passed into the hands of other parties. Thus the Ohio Legislature reasoned that a manufacturer should be permitted to attach conditions on the use of its property rights, provided that sufficient safeguards were

included in the law to protect the interest of the retailer of the commodities with which the trademarks are associated.

3. The Ohio Fair Trade Act operates on the basis of contract principles. A contract under the Ohio law arises by reason of the acts of the parties. This occurs when the owner of a trademark or trade name gives to the retailer notice of the condition on which the retailer may use that trademark or trade name and the retailer then thereafter decides to acquire commodities bearing that trademark or trade name and make use of the trademark or trade name in the sale thereof.

4. The decisions of the Ohio Supreme Court below and the Ohio Court of Appeals below recognize the right of the Legislature to determine the economic questions upon which the Fair Trade Act is predicated and to enact a law based upon principles of contract and in recognition of the property rights existing in a trademark or trade name.

5. The entire spectrum of possible constitutional objections under the Fourteenth Amendment of the United States Constitution were advanced to this Court in the case of *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U. S. 183 (1936), and rejected by this Court at that time. There is no reason in law or in fact to alter the analysis of these questions made in the *Old Dearborn* case.

6. The contention that constitutional and unconstitutional provisions are inseparably commingled in the new Ohio Act is essentially a question for resolution by the state courts and, further, fails to recognize the provision of the Ohio Revised Code which expressly states that every part of the Ohio Code is an independent section and that the holding of any one part unconstitutional does not affect any other section or part of the Ohio Code.

7. The Ohio Fair Trade Act permits the owner of a trademark or trade name to establish fair trade prices for products sold with the assistance of his trademark when he enters into a contract to that effect with a retailer in the State of Ohio. Many written contracts were entered into between the appellees herein and various retailers throughout the State of Ohio. The Ohio Fair Trade Act then permits the owner of a trademark or trade name to give notice of the prices thus established to other retailers who will in turn be bound where they acquire the manufacturer's trademarked merchandise with notice of the conditions on the use of the trademark. Accordingly, the Ohio Fair Trade Act falls within the enabling provisions of the Miller-Tydings Amendment and the McGuire Act which permit the states to enact fair trade laws which operate in this fashion.

8. If a retailer decides to avail himself of the opportunity to sell merchandise without the benefit of a manufacturer's trademark or trade name, this constitutes no violation of the Federal Food & Drug Act so long as the retailer identifies the contents of the item being sold and includes his own name on the label. Further, there is no violation of the Lanham Act in such action by a retailer. The Lanham Act, in fact, specifically recognizes the existence of property rights in a trademark or trade name and thus stands in direct contradiction to appellant's contention that no such property right exists.

## V. ARGUMENT.

### A. What the Ohio Legislature Did and Its Economic Reasons For So Doing.

In order to see the new Ohio Fair Trade Act in its proper context and to appreciate its constitutionality, one must go back to the 103rd Session of the Ohio General Assembly in 1959 to see the problem with which it was presented, the facts which were laid before it, its decision to act and its reasons therefor.

This Court has noted many times that the purposes which impel a state legislature to pass an act are relevant in a consideration of its constitutionality because a court must determine whether they are *clearly unreasonable* purposes. If they are reasonable and also bear a reasonable relation to the ends sought to be met, the Court cannot go beyond that point in determining constitutionality. *Ferguson v. Skrupa*, 372 U. S. 730; *Frost Trucking Co. v. R. R. Com.*, 271 U. S. 583, 600, Holmes, J., dissenting.

The record before this Court (RU, pp. 162-366) contains the transcript of the entire hearings on Ohio House Bill No. 318 which eventually became Ohio Revised Code Sections 1333.27 through 1333.34, the so-called new Ohio Fair Trade Act. These many pages of the transcript of the Hearings before the Legislative Committees of the Ohio General Assembly, which included three lengthy and full-scale hearings before the entire Judiciary Committee of the Ohio House of Representatives (a committee made up entirely of lawyers) and again three lengthy and full-scale hearings before the entire Judiciary Committee of the Senate of the State of Ohio, indicate the extreme thoroughness with which the Ohio Legislature considered the social and economic problems presented by such legislation and

the need for such legislation. Upon such consideration, in Section 1 of the Act or Section 1333.27, Ohio Revised Code, the Legislature spelled out in detail its conclusions as to the social and economic problems to be met by this legislation and the legal basis upon which it was purporting to act. It is perhaps significant that both of these Committees, after such careful and lengthy deliberations, recommended the passage of this Act without a single dissenting vote. The General Assembly then enacted the bill as recommended into law by overwhelming majorities (only four dissenting votes in the House and two in the Senate). After a veto by Governor DiSalle on purely policy grounds, the General Assembly again passed the Act, notwithstanding the objections of the Governor, by a vote of 112 to 6 in the House and 30 to 3 in the Senate.

In passing and repassing this legislation, the General Assembly was largely motivated by the conclusions which its Committees had drawn as to the dangers to the state and the public welfare which were presented by the unrestricted price warfare which was rampant in the State of Ohio following the decision of the Supreme Court of Ohio outlawing the so-called "non-signer" clause of the old Fair Trade Law. *Union Carbide and Carbon Corp. v. Bargain Fair, Inc.*, 167 Ohio St. 182, 147 N. E. 2d 481 (1958). As has been noted, the conclusions drawn as a result of this lengthy study were set forth for the courts and the people in Section 1333.27 of the new law and the reasoning behind these conclusions and the vast amount of evidence and data justifying and supporting them are found in the transcript of the committee hearings which are before this Court.

The test, of course, is *not* whether after a review of this legislative history and the evidence contained therein and the conclusions which the General Assembly of Ohio

drew, the Court would or would not have arrived at the same conclusion as the Legislature did. The visceral and intellectual reaction of the judges to the purpose to be achieved is irrelevant if there is a rational and relevant basis in the action taken and the end to be achieved. If the end to be achieved is a reasonable one within the police powers then the conclusion of the Legislature should be final. It is submitted that it is *impossible* to peruse the legislative record of this legislation and conclude that the General Assembly of Ohio acted capriciously.

Indicative both of the broad base of the support for this legislation and the far-reaching nature of the General Assembly's investigation into this matter is a review of the persons who, in *but one* of the several hearings, appeared and registered their desire to testify on behalf of this legislation. Some 58 people appeared at the hearing on April 22, 1959, ready to testify in support of the then proposed Fair Trade Bill. (RU, pp. 237-240.) Many of these people were not only representing themselves and their own businesses but were also there representing and authorized to speak for groups of like-minded persons in their own communities. The legislature also received and evaluated the testimony of opponents to the new fair trade act.

In addition, on the same day the Committee accepted written statements from representatives of such companies as the International Silver Company, Hamilton Watch, Pyramid Rubber, Schick and Johnson & Johnson. Testimony was offered and given by Mr. Taylor Zettler of the Zettler Hardware Stores of Columbus, Mr. Pete Olmstead representing the Ohio Hardware Association and Mr. Clarence Moses of the Ohio Retail Jewelers' Association. The representation at these Committee Hearings and others blanketed the entire retail economy of the State of Ohio, including the drug, hardware, grocery, glassware, rubber

products, jewelry, construction, appliance, photo and camera, tobacco, variety store and newspaper industries.

Perhaps it would be helpful to consider briefly *why* these persons from such widely diverse fields and lines of retail business (and the very people on behalf of whom this brief is submitted) felt so strongly about the need for this law that they left their businesses and came to Columbus ready to testify before a legislative committee. As has been stated, it is one of the purposes of this brief to explain to the Court, as it appeared to the Legislature, why fair trade is a question of economic survival to many small businessmen in many different lines of business and why, as a matter of public policy, the Ohio Legislature considered that survival important to the economy and welfare of the state. If these small businessmen or any substantial number of them were to be squeezed out of business, the general public might not only be deprived of the convenience and services afforded by the small retailer, who is often located in the customer's own neighborhood, but their extinction would mean an inevitable drift toward monopoly of retail distribution in the hands of a few large retailers. In addition, the vertical integration of some manufacturers into the retail business in order to protect their distribution systems would constitute a threat to the consuming public which monopoly always engenders. And, the Legislature knew that price footballing of branded merchandise would seriously impair the good-will and property rights developed by manufacturers in their trade-marks and trade names.

These were the conclusions which the Legislature reached and they certainly cannot be said to be without rational basis. These conclusions were summarized, *inter alia*, in Section 1333.27 of the Act itself, as follows:

"§ 1333.27 Purpose and policy.

"(A) Sections 1333.27 to 1333.34, inclusive, of the Revised Code are enacted in the exercise of the police powers of the state and in pursuance of the power specifically granted the general assembly by the people in Section 2 of Article XIII, Ohio Constitution, to regulate the sale and conveyance of personal property, and the purposes of sections 1333.27 to 1333.34, inclusive, of the Revised Code, are generally to protect and preserve small business, to safeguard the good will of trade-marks and trade names, to further wholesome competition, to prevent monopoly in the distribution of goods, and to promote the public welfare by securing wider distribution of commodities and an increase in the production thereof, and thereby reducing production and distribution costs, protecting and increasing gainful employment in manufacturing, wholesaling and retailing, all for the benefit of the consumer and the well-being of the citizens of the state.

"(B) It is the further purpose of sections 1333.27 to 1333.34, inclusive, of the Revised Code, to promote the distribution in commerce in the state of identified merchandise which is in free and open competition with other articles of the same general class. Where fair, equitable, and competitive prices cannot be maintained in all appropriate stages in the distribution of such identified merchandise, the marketing of such merchandise is depressed and the quantity thereof moving in the channels of commerce in the state declines.

"(C) To remove obstructions to the marketing of identified merchandise in commerce which are occasioned by unfair selling practices, it is the policy of the state to afford distributors of identified merchandise an effective means whereby the sale of such merchandise at all appropriate stages of distribution may be consummated at prices adequate to stimulate

distribution and low enough to enable distributors of such identified merchandise to compete effectively with those marketing other goods, who by size and dominance may distribute such goods through their own retail outlets or by franchise or consignment methods, and to satisfy the needs of ultimate consumers."

The story of the impact of the practices which the Fair Trade Law is designed to curb on various types of businesses is told in the Committee Hearings before the Ohio General Assembly as well as in the various affidavits of retailers, wholesalers and manufacturers which are also part of the record before this Court in these cases. (The affidavits referred to are in RU, pp. 109-161.) In summary, it is this:

Ohio, because of its geographical composition, has many small and medium-sized towns. In these areas, particularly where industry, commerce and agriculture have been intermixed, the hardware merchant has always provided an important service to his community and has been an active participant in community life. The same is equally true of the neighborhood or suburban hardware dealer in the larger cities of the state. Usually the hardware store owner's compensation, in view of his investment in capital, time and labor, has been relatively modest. The independent hardware retailer in order to serve properly the community in which he operates must carry a wide variety of products, ranging from the traditional hardware items such as nails, tools, etc. to appliances, paint and other consumer items. On many of those items the return is not sufficient to cover the cost of stocking and handling. Therefore, as with most service retailers, the hardware store can only provide these services and still make an overall profit by relying on a normal profit from the sale

of certain trademarked and publicly accepted quality items, such as Sunbeam small appliances, the Corning "Pyrex" line, etc. These items, which are normally fair-traded to permit the retailer a 33⅓% gross profit, are unfortunately ideal "bait" items for the discount operator because of their public acceptance and price identification. These large operators, quite often owned out of the community, use these "bait items" as traffic producers in order to attract customers and sell them off-brand "bargains," or last year's models. They skim the "cream" from the local dealers on their profitable items and eventually make it impossible for them to continue to stock and supply the low-volume convenience items for their customers in the geographical area which they serve. The large discounter will normally stock only the fast-moving, well-known hardware items and will not carry the countless staples which the independent retailer feels obligated to have available. Operating at an overall net profit margin of less than 2% the independent hardware retailer cannot withstand this kind of price-footballing competition.

It is not the purpose of this brief to elaborate at length on the advantages to our economy and political system of preserving the small independent businessmen, such as the hardware dealer, as a part of the fabric of our society. The Legislature concluded that this is important to the general welfare and that the discouragement of monopoly in retailing is vital to the general welfare. Whether or not the Court agrees or disagrees with this conclusion, it cannot be denied that it is at least one *possible* and *logical* conclusion which could be reached. This alone is sufficient to bring this legislation within the ambit of the power and right of the General Assembly to enact in the promotion of the general welfare. It certainly is as proper for the

Legislature to consider the economic climate necessary to protect small business from extinction as it is to concern itself with the minimum wages to protect labor, price supports to support the farmers, and the varieties of other legislation in which the Legislature has been required to make a determination among competing interests and balance those interests to promote the public welfare.

In addition, even a cursory reading of the transcript of the hearings before both the House and Senate of the Ohio Legislature prior to passage of this Act will make clear the Legislature's concern with the threat to the public which the growth of giant retail monopolies brings about and its concern for the protection of the trademarks and trade names of those small and medium sized manufacturers. These manufacturers, through the production of quality goods and the advertising of such goods widely to the public, build up a good will in those trademarks and trade names in which they have a property right quite aside from the commodities themselves which the Legislature felt should be protected against parties who would unscrupulously destroy that good will to their own benefit.

The pattern which we have seen in the retail hardware business as shown by the evidence before the Legislature and by the record in these cases is repeated in a somewhat similar fashion in the photograph and camera equipment business where the independent camera retailer has suffered heavily from the predatory practices of the discount houses.

Sale of photographic equipment and supplies requires a competent and trained retailer, not only from the aspect of repair and service, but from the desirability and necessity of advising the consumer concerning capabilities, use

and care of cameras and photographic equipment. It is essential that the retailer have such training. The large discount house ignores all of this, operating with essentially untrained personnel, using the cameras for their purposes only so long as they continue to attract customers. Photographic equipment and supplies are popular items of merchandise and ideally suited for use by the discount house to attract the consumer who sees himself as securing a bargain. When the consumer needs service, or advice on his equipment, he will return to the shop having the trained independent retailer. This is all fine for the discount house operator, but cannot last, for the independent retailer will not be able to remain in business solely by reason of his service and free advice if he is unable to sell his camera stock-in-trade at a profit. The camera business is also a target for those discounters who lure their customer in by advertising a well-known name and then switch him to a cheaper and unknown brand once he is within their meshes. The affidavits of Benton F. Kauffman and Otto G. Graeff (RU, pp. 122, 159) demonstrate these points.

The retail jewelry business is another obvious target for the deceptive practices of the discounter. In jewelry merchandising, the role of the merchant is extremely important. The authenticity of an item, its quality and the jeweler's reputation are vital to the customer. When the buyer doubts the integrity of the jeweler, he will not transact business with him. Thus, in this trade area, the price warfare, loss-leader practices, sales manipulation, misrepresentations and generally unfair practices accompanying discount operations are devastating. Because a jeweler handles items of merchandise which are unique and which are not fair-traded, the price cutter's opportunity is lucrative. The discounter will lure a customer

into his store by advertising for sale, for example, a fair-traded watch with a known value. The cut-rate jeweler is not anxious to sell this watch but only to attract trade and give the impression of charging generally low prices. Having done this, he may then warrant the list price of a diamond as much as double its true value and offer it for "sale" to the customer at an "alleged" 50% discount. In this way the discounter uses the manufacturer of the watch and the legitimate jeweler who has maintained the manufacturer's price of a name brand watch to create the bait setup whereby the cut-rate jeweler profits on another item.

These practices, as shown by the evidence before the Legislature and the record below, are not illusory. Real dangers are created to the very existence of the small independent retailer and to the public as a whole. The retail drug business has been often cited as one of the leading proponents of fair trade legislation. The reason is fairly simple. Druggists are normally expected to be open long hours, to provide prescription service in their neighborhood areas on a 24-hour basis, to provide delivery and other such services in connection with carrying a wide and complete line of prescription items and health aids. Economically, they can only do this if they have protection on certain well known brands of prescription, proprietary and cosmetic items which the customer expects to get from his drugstore but which he can be lured into buying elsewhere by the claim of a "lower" price. A concrete illustration of how one discounter, who happens to be the appellant in these cases, operates in a way inimicable to the public interest is brought home in the record in Case No. 489. The record shows how a discounter skims the "cream" off the top of the business by refusing to give those services which the public has come to expect

from druggists, such as a full line of prescription items, 24-hour service, etc.

William J. Crable, an employee of the Pinkerton Detective Agency, was given two separate drug prescriptions and instructed to have these filled, first at the appellant's drugstore and then at any drugstore that he might select at random. (RU, p. 148.) At the appellant's store, he presented his prescriptions to a clerk who stated that it would take a little time to fill. About ten minutes later the prescription slips were returned to Crable with a piece of paper attached to each stating "do not have." The clerk explained that they probably did not have the necessary ingredients to fill these prescriptions. Crable then went to three other retailers selected at random, including a store in downtown Cleveland and neighborhood pharmacies, at which locations the prescriptions were readily filled. On a subsequent date, a third prescription was taken to the appellant's store and then to three other random stores with similar results. (RU, p. 149.) That is, the prescriptions were readily filled by the independent pharmacists but were refused in the appellant's store. These prescriptions were examined by local pharmacists who stated that there was nothing unusual about them aside from the fact that they did require a little effort to prepare. (RU, pp. 152, 155, 157, 158.) It is not surprising that a discounter who is operating on a fast-turnover basis would not carry the staff required to render the service needed by the public in connection with the sale of drugs.

This is but one example of the service people have quite properly come to expect from their professional druggists but which the fast-moving discounter, interested only in fast turnover and perhaps his own unknown line of higher profit merchandise, is not able or willing to supply.

As Professor Davidson of the Ohio State University and joint author of a basic text in marketing used in over 200 universities has pointed out in the record in these cases when speaking of the services rendered by the independent retail druggist which will make him so particularly vulnerable to the practice of the giant discount operation (RU, pp. 113-14):

> "The importance of the retailer is further highlighted in the drug field. His retail outlet must be geographically convenient to the consumer. The person seeking to have a prescription filled or to purchase a supply of vitamins does not want to drive five miles to do so. The retail store must be open from early in the morning until late at night. As mentioned above, prescriptions can be filled only by a registered pharmacist. Also the pharmacist renders many services in the sale of drugs that are not limited to prescriptions. They advise consumers as to the nature and potency of drugs, they give warnings when indicated, and furnish advice as to the handling and storage of drug products. It is thus obvious that strong sales support from these retailers can only be expected when they feel they are being fairly treated by the manufacturer."

It is not unreasonable for a state legislature to take the view that the small business in its state merits legislation protecting its competitive position against what the legislature conceives to be the unfair business practices of the giant discounter. Nor does it seem unreasonable for a state legislature to conclude that the use of nationally branded merchandise for the purpose of attracting business away from the small merchant is an unfair practice or that the public is not benefited when it becomes impossible for a person to remain in business and still render service in connection with the sale of merchandise.

The extent and nature of the operations of a giant discounter are typified by the appellant herein. Bernard Shulman, in his affidavit, states that he is the president of the appellant and other corporations which operate drugstores and retail outlets in the Norwood, Cincinnati, Dayton, Columbus, Cleveland and Youngstown areas. (RU, p. 50.) Actually, Mr. Shulman's operations are even wider. (See Federal Trade Commission Docket No. 8576.)

In the decision of the Supreme Court of Ohio below, Judge Griffith sums up the reaction of the Ohio Legislature to the practices and to the public threat created thereby when he says in his own opinion (RU, p. 420):

> "Even to the most casual observer it is readily apparent that the small independent merchant is gradually being forced out of business through the operation of the large merchandising establishments * * *."

With this background in mind and the conclusions the Ohio General Assembly had drawn from the evidence presented to it, i.e., that the small retailer would be driven from business to be supplanted by giant monopolistic discounters, that competition was not being protected by the present cut-throat system but rather that monopoly and oligopoly were being encouraged, and that the legitimate right of manufacturers to protect their property rights in their trademarks and trade names and to contract concerning their use was being destroyed, how did the Ohio Legislature decide to deal with this problem? Was their approach to its solution reasonable and relevant to the end sought to be achieved and within the framework of the Legislature's right to deal with the public evil even though perhaps in so doing it might step on someone's toes?

## B. The Legal Basis Upon Which the Ohio Legislature Acted.

The Legislature recognized that branded, trademarked merchandise was the principal tool being used by the discounter to drive the independent merchant from the marketplace. They also recognized that this use by the discounter severely impaired the property rights of the trademark owner in his brand or name. Thus the Legislature reasoned that by recognizing the property in a trade name and by granting a statutory assist to prevent abuses of this property interest, it could accomplish its legislative purposes as set forth in the Act itself.

The property right in a trademark or trade name is not *created* in any fair trade law although the new Act does specifically recognize the existence of this right. The property rights in a trade name or trademark as built up through product good will, advertising and promotion were recognized long prior to, and independently of, fair trade legislation.

A trademark is a visible reputation and it is the reputation which the price cutter uses to get people into his store. This does not belong to him but belongs to the owner of the trademark, which is usually registered by the owner in the United States Patent Office. As Mr. Justice Frankfurter stated in *Mishawaka R. & W. Mfg. Co. v. S. S. Kresge Co.*, 316 U. S. 203, 205 (1942):

> "The protection of trade-marks is the law's recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them. A trade-mark is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been led to believe he wants. The owner of a mark exploits this human propensity by making every effort to impreg-

nate the atmosphere of the market with the drawing power of a congenial symbol. Whatever the means employed, the aim is the same—to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears. Once this is attained, the trade-mark owner has something of value. If another poaches upon the commercial magnetism of the symbol he has created, the owner can obtain legal redress * * *."

A trademark is an intangible property right which the owner does not part with when he sells the goods to which the mark may be affixed. As this Court said in *Bourjois v. Katzel*, 260 U. S. 689, 692 (1923):

"* * * Ownership of the goods does not carry the right to sell them with a specific mark * * *."

Trademark protection is peculiarly within the province of the several states since the right to a trademark itself is dependent on state law This proposition has been well established for many years. In *Trade-Mark Cases*, 100 U. S. 82, 93 (1879), Mr. Justice Miller said:

"* * * the property in trade-marks and the right to their exclusive use rest on the laws of the States, and, like the great body of the rights of person and of property, depend on them for security and protection * * *."

If, as this case holds, a state which creates trademark property may protect it against limitation, why cannot the state equally protect the trademark owner against other acts which impair the value of his trademark and may destroy it? The sale of trademarked goods at cut prices is recognized and has been recognized as an injurious practice by our Legislature as well as by the United States Congress and at least 44 other state legislatures.

Persistent price cutting is as destructive of trademark property as wholesale infringement.

It cannot be doubted that the legislature of a state has the power to pass laws to protect the owners of trademarks or other property against trespass, if the legislation adopted is reasonably designed to accomplish that end and is not arbitrary. Trademarks are property. As Mr. Justice Holmes said in *Beech-Nut Packing Company v. P. Lorillard Company*, 273 U. S. 629, 632 (1927):

> "* * * in a qualified sense the mark is property, protected and alienable, although as with other property its outline is shown only by the law of torts, of which the right is a prophetic summary * * *."

Moreover, a trademark is property of a peculiar, intangible sort. Its value depends upon acceptance by a fickle consuming public. It is difficult to develop and easy to injure. As Mr. Justice Holmes again said in *Bourjois v. Katzel*, *supra*, at page 692:

> "* * * It deals with a delicate matter that may be of great value but that easily is destroyed, and therefore should be protected with corresponding care * * *."

The protection of trademarks has always been regarded as sound public policy. Mr. Justice Clifford said in *McLean v. Fleming*, 96 U. S. 245, 252 (1877):

> "Everywhere courts of justice proceed upon the ground that a party has a valuable interest in the good-will of his trade, and in the labels or trade-mark which he adopts to enlarge and perpetuate it. Hence it is held that he, as proprietor, is entitled to protection as against one who attempts to deprive him of the benefits resulting from the same, by using his labels and trade-mark without his consent and authority * * *."

An attempt to secure a "free ride" on another's investment in business and reputation is, as we have already seen and the facts of these cases demonstrate, exactly what the discounter or price cutter seeks to accomplish. In so doing, the discounter not only damages the trademark but causes irreparable harm to the small businessman as previously indicated.

The passage of the Sherman Act, 15 U. S. C., Sec. 1, et seq. by the Congress of the United States in 1890, as interpreted by the courts, had a significant effect on resale price maintenance contracts as a protection of the trademark owner's property interest. The thrust of the Sherman Act was to declare illegal under federal statutory law contracts or other combinations or conspiracies which resulted in restraint of trade in the field of interstate commerce. Under that Act, a so-called fair trade contract between a manufacturer and a retailer was attacked as being illegal and a majority of the Supreme Court held that such a contract did violate the provisions of the Sherman Act. This was in the case of *Dr. Miles Medical Co. v. John D. Parks & Sons Co.*, 220 U. S. 373, 55 L. Ed. 502. It should be noted that this decision was merely a matter of *statutory construction* of the Sherman Act and it has never been considered by this Court that resale price maintenance contracts were in any sense repugnant to *any provision of the United States Constitution*. If in the words of Justice Holmes the Fourteenth Amendment did not adopt Spencer's Social Statistics neither did it adopt Adam Smith's The Wealth of Nations. The Constitution is completely neutral as to any particular economic philosophy or predilection. *Ferguson v. Skrupa, supra.*

Following this case there was a period of some twenty years when price cutting was untrammeled throughout the United States. Finally, California made the first real

effort to re-establish the protection of the now much-abused manufacturer's trademark and good will by passing the first of the state fair trade laws. This Act, of course, could and did apply only to intrastate commerce because of the effect of the *Dr. Miles* case and its interpretation of the application of the Sherman Act to interstate commerce.

Finally, the United States Congress enacted the Miller-Tydings amendment to the Sherman Act and later the McGuire Act amendment to make it possible for the states to take the legislative steps of a fair trade law to protect the owners of trademarks and trade names against the predatory practices of discounters even as they affected interstate commerce. This was the so-called enabling legislation which exempted state fair trade laws from the operation of the Sherman Act. Since the first enactment of fair trade by California in 1931, a total of 45 states have adopted fair trade statutes. Two states—Ohio in the new Ohio Fair Trade Act and Virginia the year before in its new Fair Trade Law—have rejected the old non-signer provision which was originally contained in the California Act and have grounded their statutes on purely contractual principles.

The proprietor's property interest in his trademark or trade name was one of the prime motivating factors which spurred the Ohio Legislature to action in adoption of the 1959 Fair Trade Act and in its efforts to overcome constitutional objections to the old law and to the non-signer provision. In Section 1333.27 the Legislature specifically declared its purpose "to safeguard the good will of trademarks and trade names." In Section 1333.31 the Legislature declared that:

> "A proprietor shall retain a proprietary interest in any commodity with respect to which he is a proprietor after he has sold it to distributors, so long as such

> commodity continues to be identified by his trade-mark or trade name, by reason of his interest in stimulating demand for such commodity through effective distribution to ultimate consumers and of his interest in continuing protection of the good will associated with his trade-mark or trade name."

And in so doing, it is submitted, the Ohio Legislature was merely affirming a common commercial fact of life. Appellant apparently, however, takes the position that there is no property interest in a trademark or trade name. This is significant in that whether or not appellant should prevail in seeking to upset the decisions of the courts below is dependent upon appellant's being able to convince this Court that there is no property interest in a trademark or trade name. That is the crux of the case. Since there is a property interest in a trademark or trade name, surely the Legislature may permit the parties to enter into a contract relationship concerning this property interest arising by reason of the acts of the parties.

Until litigation developed under the Legislature's 1959 Fair Trade Act, there was no real dispute concerning whether a trademark was property. In fact, even the holding in *Union Carbide and Carbon Corp. v. Bargain Fair, Inc.*, 167 Ohio St. 182 (1958), which does not invalidate written fair trade contracts, tacitly recognizes the existence of property in a trademark for this is the basis upon which the manufacturer and retailer can form a fair trade contract.

We submit that the Legislature had a reasonable basis for deciding that trademarks would be damaged by price cutting and that they could be protected from that damage by a Fair Trade Act. Therefore, it is not for the courts to reverse such a legislative judgment.

### C. How the Ohio Fair Trade Act Operates.

The new Ohio Fair Trade Act permits contracts to arise from the acts of the parties with respect to an interest in a trademark or trade name.

If a property interest exists sufficient to support a written contract between The Upjohn Company and Hudson Distributors, will that interest not also support the creation of rights and obligations arising by reason of the acts of the parties?

It may be agreed that if Upjohn and Hudson Distributors had designed a written agreement whereby Hudson would maintain Upjohn's minimum retail prices in return for which Upjohn would permit Hudson to use the Upjohn trademark in their retail sales, a valid contract would have been formed between Hudson and Upjohn even though Hudson might be acquiring the products bearing the Upjohn name from a third party wholesaler in Detroit. A sale below the agreed prices would constitute a breach.

The Legislature has now provided that a contract may also exist where Upjohn gives notice of the establishment of its minimum retail prices to Hudson and thereafter Hudson, having received this notice, decides to acquire the commodities bearing the Upjohn trademark and to use those marks in the sale of the commodity.

The only difference between the above two situations is that one agreement is in writing and the other arises by reason of the acts of the parties. Surely there is no constitutional significance to this difference.

If a person owns a piece of property—say, an apple—he may enter into an agreement with another person to sell that apple for five cents. A binding contract arises and the purchaser is obligated to pay the seller five cents. The seller may also place a sign on his apple saying "For Sale—5¢." If another person then comes along, reads the

notice and then takes and eats the apple, he is equally obligated to pay the seller five cents. This result follows even if the apple-eater says to himself while taking and eating the apple, "I intend to pay only three cents." The principle is the same whether the property interest transferred is an apple, a tract of ground, an intangible property interest such as an exclusive franchise or license—or a trademark or trade name.

However, the Legislature went further and provided additional safeguards to the discounter not ordinarily inherent in a contractual relationship. The Legislature provided that a retailer might—even though he had decided to acquire a commodity having a given brand name after full knowledge of the condition on his use of that brand name—escape from the contract if he later regretted his bargain. This the retailer may do by selling the commodity back to the manufacturer at the invoice price. In addition, the Legislature has provided that the retailer may, if he decides not to take advantage of the manufacturer's trade name to assist him in reselling the goods, sell the commodity *qua* commodity at any price he chooses. (R. C. Sec. 1333.33.) In the apple analogy, the purchaser does not have these privileges.

What the legislatures and the courts have really been faced with in resolving questions under the fair trade acts is a proper allocation of competing property rights and interests. There is the interest of the manufacturer in his trademark or trade name and there is the interest in the commodity itself.

The new Ohio legislation introduces new and more detailed safeguards to the retailer than were present in prior fair trade acts. The Ohio Act strikes a balance between the competing proprietary interests. It still permits the owner of a trademark or trade name to set the price or

conditions on the use of that mark or name just as the owner of any other piece of property may fix its price. However, it prevents the owner of a commodity from being arbitrarily forced to accept that price or those conditions by (1) giving him a choice through notice of the conditions before he elects to use the trademark or name, and (2) allowing him to break the relationship with the trademark owner without economic loss even after he has made such an election.

These contract principles—drawn from the language of this Court in *Old Dearborn*—are set forth in Section 1333.28 (I) of the Ohio Revised Code, which is the basic provision of the new Ohio Fair Trade Act:

> " 'Contract' means any agreement, written or verbal, or arising from the acts of the parties. The establishment by a proprietor of a minimum resale price for any commodity pursuant to the provisions of Section 1333.29 of the Revised Code and the proprietor's permission for a distributor to acquire and use the proprietor's interest in the trademark or trade name in reselling the commodity shall constitute a contract and sufficient consideration from the proprietor for a promise by the distributor not to sell such commodity at less than the minimum price established by the proprietor. Any distributor (whether he acquires such commodity directly from the proprietor or otherwise) who, with notice that the proprietor has established a minimum resale price for a commodity, accepts such commodity shall thereby have entered into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefor by such proprietor."

It is noteworthy that in the present case, appellant admits that it received notice from appellees of the establishment of their fair trade prices by written contracts with other dealers and of the conditions upon which ap-

pellees were willing to permit a usage of their trademarks and trade names. (RU, pp. 9, 21, 28; RL, pp. 2, 8, 21.) Thereafter, appellant purchased commodities intending to use appellees' marks and names in connection with the resale thereof. Appellant did not have second thoughts concerning these conditions and return the commodities to appellees in order to obtain its money back. Nevertheless, appellant admittedly used appellees' marks and names in selling commodities but disregarded the condition on which the right to use these marks and names had been acquired.

### D. The Decisions Below.

In commenting on Section 1333.28 (I) of the Ohio Revised Code, Judge Griffith, speaking for the Supreme Court of Ohio in these cases below, had these extremely pertinent observations to make (RU pp. 417-419):

> "This provision is the core of the act. When read in conjunction with the rest of the act, it provides in essence that, when a retailer with notice that an item has been fair-traded procures it for resale, he is deemed to have entered into an implied contract with the owner of the trademark that he will sell the item at the fair-trade price.
>
> "There is no question that express maintenance contracts, are valid. *Garst v. Harris,* 177 Mass., 72; *Grogan v. Chaffee,* 156 Cal., 611.
>
> "The statute creates an implied contract by act of the parties. The doctrine of implied contracts is almost as old as the law of contracts. The simple illustration of the appellees that, where one takes a candy bar from a grocer's shelf and eats it, he obligates himself to pay for it is a basic example of an implied contract by act. No word need be said; conduct creates the contract.

*"It must be remembered that there is no compulsion on a retailer to handle the trademarked goods.* Since the act applies only to goods which are in free and open competition with goods of the same nature, he may select other goods for sale. *If he selects the fair-trade goods, it is his voluntary act, and he must abide by the conditions imposed thereon by the proprietor.* The fact that he may not like the conditions is inconsequential. Most of us are forced by circumstances to enter into contracts where we do not like the conditions imposed on us, yet if we voluntarily accept the merchandise we must abide by the conditions attached thereto. *For example, in purchasing a home, there are in most instances restrictive covenants as to use. We may not like such conditions, but if we accept the contract we must abide thereby. Liking or not liking the conditions of acquiring property has no effect on the validity of the contract.* If the retailer chooses to accept the goods, he is bound by the conditions imposed thereon, in this instance, the fair-trade price." (Emphasis added.)

Later in his opinion he said further on this point:

"*Legislative conditions and contracts are not new in the law, they appear in many instances,* and once the parties enter into an agreement they are bound by the legislative contract no matter what the parties intended. This is exemplified in the law relating to insurance contracts wherein statutory provisions and conditions *are imposed in every insurance contract no matter what the intent of the parties. This is true as to statutory bonds, negotiable instruments, bulk sales and mechanics' liens.* (Emphasis added.)

"This provision of the law is essentially very simple. It is simple contract law. The owner of a trademark offers his goods bearing that mark which are in free and open competition in the open market for resale, on condition that the retail price be maintained at a certain level. This is basic contract law; an offer

may be made on condition. Under the Ohio law, the owner of the trademark, once the goods enter into Ohio, has by statute sufficient interest to control the resale price of the goods. The acceptance of this offer is purely voluntary, but if it is accepted it must be accepted on the imposed conditions or not at all. If the offer is accepted, the retailer in consideration of the goodwill attached to the trademark and the demand created by the owner thereof contracts to to sell it at the agreed price."

Then he came to consider the constitutional power of the General Assembly of Ohio to enact this legislation and to answer attacks made on its constitutionality which in essence were identical with those made before this Court in these cases. To this his answer was clear (RU pp. 422-424):

"When the general welfare of the small merchant is considered together with the necessity of protecting the goodwill and value attached to a trademark, it was clearly within the legislative power to enact such protective legislation, and the court will not substitute its judgment in this instance for that of the General Assembly.

* * * * *

"Two other matters are urged as to the constitutionality of this legislation.

"The first of these relate to the delegation of legislative power as to price fixing.

"The final contention is that such act violates the constitutional right of one to sell his own property on his own terms. It having been determined that the implied contracts herein are valid, the retailer takes the goods on the conditions of the offer and thus voluntarily agrees to comply with the fair-trade price.

"The General Assembly has re-enacted fair-trade laws in Ohio. In so doing it met constitutional objec-

tions to the former act (1936) expressed by this court in the *Bargain Fair* case. The nonsigner provision of the old law was eliminated. A retailer will be bound to fair-trade a product only by his own contract, either a written contract or a contract implied under the specific statutory language from the retailer's conduct in accepting the product for resale after notice of its being subject to fair trade.

"It is the intention of the new act to declare and protect the proprietary interest of a manufacturer in his trademark and the good-will attached to it. *Cf. National City Bank v. National Window Cleaning Co., supra.* The means employed by the act is the long and well established legal doctrine of implied contract. None of the constitutional attacks on this new act have merit."

**E. Is There a Federal Constitutional Question?**

The problem of the validity of a state fair trade act under the Fourteenth Amendment to the Constitution has long since been put to rest by this Court in a case in which every conceivable argument that has been or could be made against its constitutionality under the Fourteenth Amendment was raised. The landmark decision in construing the constitutionality of state fair trade acts was this Court's unanimous opinion in the case of *Old Dearborn Distributing Company v. Seagram Distillers Corp.*, 299 U. S. 183.

The *Old Dearborn* decision represents the undivided thinking of this Court in 1936 and the analysis made by the Court in that case still stands as persuasive authority by reason of its thorough and logical treatment of the problems met by fair trade legislation—problems which have even greater significance today as giant discounters seek to grasp control of the retail marketplace, thereby threatening the economic survival of the independent merchant.

Though its counsel seems loath to admit it, most if not all of appellant's arguments in the state courts below come down to the fact that appellant does not agree with the previous decision of this Court in *Old Dearborn*.

It is interesting that appellant now relies for support of this argument entirely on two cases decided by this Court prior to *Old Dearborn: Browning v. Hooper*, 269 U. S. 396 (1926), which is completely irrelevant to the point at issue, and *Carter v. Carter Coal Company*, 298 U. S. 238 (1936), which was decided by the same court which decided the *Old Dearborn* case in an opinion written by the same judge who wrote the opinion in the *Old Dearborn* case a few weeks before the *Old Dearborn* decision. What was said in that case, as an examination of the facts will show, was completely distinguishable from and irrelevant to the problem presented to the Court by these cases.

This Court noted with great pertinence in *Old Dearborn* that the constitutional assault on state fair trade laws came as an after-thought by discounters seeking to protect their own business interests after the economic arguments of these groups failed to convince the various state legislatures. This Court noted at pages 190-91 of the opinion:

> "It is not without significance that while the proposed legislation was vigorously assailed in other respects, we do not find that any constitutional objection was urged. And the decisions of this court, far from suggesting any constitutional infirmity in such proposed legislation, contain implications to the contrary * * *."

Thus it is important to note that the constitutional assault was conceived at the outset as a second line defense by retail discounters who had already failed in advocating

their economic arguments to the political bodies charged with the responsibility for enacting legislation. The further point noted by this Court in *Old Dearborn* concerning the legal background for fair trade legislation was the fact that resale price maintenance contracts had been considered by the Supreme Court on several occasions without the Court ever hinting that there was constitutional objection to the accomplishment of these purposes by legislative action. In fact, the Court recognized that it itself had invited such legislation at page 191:

> "* * * While these observations of the court cannot, of course, be regarded as decisive of the question, they plainly imply that the court at the time foresaw no valid constitutional objection to such legislation, for *it cannot be supposed that the court would suggest a legislative remedy the validity of which might seem open to doubt.*" (Emphasis added.)

The social and economic need for legislation permitting the manufacturer of trademarked merchandise to exercise some control over the price at which such would be sold under a manufacturer's trademark or trade name was recognized by Justice Oliver Wendell Holmes even before the enactment of any state fair trade law or the federal enabling legislation which has cleared all conflict between state fair trade and federal antitrust laws. Justice Holmes, dissenting in the case of *Dr. Miles Medical Company v. John D. Parks and Sons Co.*, 220 U. S. 373, said at page 412:

> "* * * I think that we greatly exaggerate the value and importance to the public of competition in the production or distribution of an article (here it is only distribution), as fixing a fair price. What really fixes that is the competition of conflicting desires. * * * As soon as the price of something that we want goes

above the point at which we are willing to give up other things to have that, we cease to buy it and buy something else. * * * The Dr. Miles Medical Company knows better than we do what will enable it to do the best business. We must assume its retail price to be reasonable, for it is so alleged and the case is here on demurrer; so *I see nothing to warrant my assuming that the public will not be served best by the company being allowed to carry out its plan. I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get.*" (Emphasis added.)

The Court in *Old Dearborn* gave considerable attention to the question of whether there was a legitimate economic problem to which the state legislatures could address themselves in enacting fair trade legislation. In approaching this question this Court acted with proper judicial restraint where some other courts have sought to match their own evaluation of the wisdom of the law with the conclusions drawn by the state legislatures. When a court follows the latter approach it in effect sets itself up as a supra-legislature and thereby misconceives its function under our tripartite form of government.

The validity of this Court's approach to the economic question presented is evidenced by Justice Sutherland in speaking for this Court when he said in *Old Dearborn*, 299 U. S. at pp. 195-6:

"There is a great body of fact and opinion tending to show that price cutting by retail dealers is not only injurious to the good will and business of the producer and distributor of identified goods, but injurious to the general public as well. The evidence to that effect is voluminous; but it would serve no useful pur-

pose to review the evidence or to enlarge further upon the subject. True, there is evidence, opinion and argument to the contrary; but it does not concern us to determine where the weight lies. We need say no more than that the question may be regarded as fairly open to differences of opinion. The legislation here in question proceeds upon the former and not the latter view; and the legislative determination in that respect, in the circumstances here disclosed, is conclusive so far as this court is concerned. Where the question of what the facts establish is a fairly-debatable one, we accept and carry into effect the opinion of the legislature. *Radice v. New York*, 264 U. S. 292, 294; *Zahn v. Board of Public Works*, 274 U. S. 325, 328 and cases cited."

Although time has passed, the economic controversy concerning the wisdom of fair trade legislation is still raging. The record in these cases contains reams of such economic testimony.

In *Old Dearborn* this Court observed that the primary aim of the law was to protect the property rights—namely, the good will—of the producer in his trademark, brand, or trade name. The Court also noted that the fair trade law does not deal with restriction upon the sale of a commodity *qua* commodity but rather with restriction because the commodity is identified by the trademark, brand or name of the producer or owner. In *Old Dearborn* the Court found that the price cutter had been notified prior to his own acquisition of the commodity of the restriction which had been imposed upon the retail resale of a producer's product where the retailer desired to accomplish such sale with the aid and assistance of the producer's trademark, brand or trade name. That restriction was, of course, the requirement that the producer's minimum fair trade price be observed.

To the argument that the imposition of such restriction involved a delegation of legislative authority, the Court noted in *Old Dearborn* at 299 U. S. pp. 193-4:

> "Appellants here acquired the commodity in question with full knowledge of the then-existing restriction in respect of price which the producer and wholesale dealer had imposed, and, of course, with presumptive if not actual knowledge of the law which authorized the restriction. *Appellants were not obliged to buy; and their voluntary acquisition of the property with such knowledge carried* with it, upon every principle of fair dealing, assent to the protective restriction, with consequent liability under § 2 of the law by which such acquisition was conditioned. Cf. *Provident Institution v. Jersey City,* 113 U. S. 506, 514-515; *Vreeland v. O'Neil,* 36 N. J. Eq. 399, 402; same case on appeal, 37 N. J. Eq. 574, 577.
>
> "*We find nothing in this situation to justify the contention that there is an unlawful delegation of power to private persons* to control the disposition of the property of others, such as was condemned in *Eubank v. Richmond,* 226 U. S. 137, 143; *Seattle Trust Co. v. Roberge,* 278 U. S. 116, 121-122; and *Carter v. Carter Coal Co.,* 298 U. S. 238, 311. In those cases the property affected had been acquired without any pre-existing restriction in respect of its use or disposition. The imposition of the restriction *in invitum* was authorized after complete and unrestricted ownership had vested in the persons affected. Here, the restriction, already imposed with the knowledge of appellants, ran with the acquisition and conditioned it." (Emphasis added.)

Upon analysis of the provisions of the Ohio Fair Trade Law and the facts of the cases presently before this Court, is there any reason to alter the analysis or disposition made by this Court in the *Old Dearborn* case? A moment's examination of the facts of these cases reveals that every-

thing said by Justice Sutherland in *Old Dearborn* is equally applicable to the instant cases. In these cases it was not only proved that the appellant acquired the appellees' trademarked commodity with notice of the condition upon its use but this fact was judicially admitted by the appellant in its pleadings. In its second amended petition, appellant states (RU, p. 9):

> "Plaintiff has acquired the commodities bearing the defendant's trade names, trade marks and brand names after receiving notice of defendant's established minimum resale prices. Following receipt of such notice the plaintiff has sold, offered for sale and advertised for sale these commodities produced by defendant at prices lower than the minimum resale prices provided in such notice."

Thus by its own pleading, appellant brings itself squarely within the fact pattern before this Court in *Old Dearborn*.

Examination of the new Ohio Fair Trade Act reveals that it fully complies with the requirements established by this Court in *Old Dearborn* to avert any hint of delegation of legislative authority. In the *Old Dearborn* case this Court implied an agreement or voluntary relationship between the trademark proprietor and the retailer arising from the statutory requirement that the retailer's resale at a discount price must be a knowing and willful act. This implication, drawn by the Court in *Old Dearborn*, is set forth with precision by the statutory language in the new Ohio Fair Trade Act.

As to the argument of appellant that the fair trade law is so arbitrarily unfair or wanting in reason as to result in a denial of due process, this Court considered this issue in 1936 in *Old Dearborn* as involving two points.

First, this Court noted that there was no unreasonable deprivation of the discounter's property rights. Secondly,

this Court held that such limitations as were imposed upon the discounter's property rights fell within a valid exercise of the state police power. With respect to the interference with the discounter's property rights, it is clear that (a) the only right restricted is the right to the untrammeled use of the producer's brand or trade name, and (b) that for even these conditions to be effective the retailer must receive notice of them prior to the time he acquires the trademarked commodity.

This Court commented on a similar limitation of the restrictive provisions to the use of the trademark or trade name in *Old Dearborn*, 299 U. S. at page 195:

> "* * * *The ownership of the good will, we repeat, remains unchanged, notwithstanding the commodity has been parted with.* Section 2 of the act does not prevent a purchaser of the commodity bearing the mark from selling the commodity alone at any price he pleases. It interferes only when he sells with the aid of the good will of the vendor; and it interferes then only to protect that good will against injury. It proceeds upon the theory that the sale of identified goods at less than the price fixed by the owner of the mark or brand is an assault upon the good will, and constitutes what the statute denominates 'unfair competition.' See *Liberty Warehouse Co. v. Burley Tobacco Growers' Assn.*, 276 U. S. 71, 91-92, 96-97. There is nothing in the act to preclude the purchaser from removing the mark or brand from the commodity—*thus separating the physical property, which he owns, from the good will, which is the property of another*—and then selling the commodity at his own price, provided he can do so without utilizing the good will of the latter as an aid to that end." (Emphasis added.)

The second prong of this Court's finding that there was no violation of the due process clause is rested upon the ground that there exists a great body of fact and opin-

ion, justifying legislative exercise of the police power to accomplish the purposes for which fair trade legislation is intended. This observation has been discussed previously.

Although every opponent of fair trade legislation has spoken of its "right" to sell property at any price of its choosing, nowhere have these opponents advanced any reason in law or logic why they, any more than any other group in society, should be accorded the privilege or "right" of engaging in a certain conduct irrespective of its effect upon the property rights of others and upon the welfare of the public generally. The naive assumption that because a person is the owner of property he has the right to do with it what he pleases would lead to incredible results. Would appellant, for example, contend that simply because one is the owner of a car he can drive it at any speed or in any way that he pleases?

The crux of the "due process" issue has never been met by fair trade opponents. It is: (1) whether the restrictions of ownership rights of the retailer-discounter in the commodity itself are fairly dealt with, and (2) whether there is a legitimate economic basis for the exercise of legislative power in effecting such limitations as do exist. The answer to both of these questions as set forth in the *Old Dearborn* case has as much merit today as in 1936.

Relating now these constitutional arguments made by the appellant to the facts of these cases, in both of these cases the facts are clear and admitted by the pleadings. Both the manufacturers involved herein, Upjohn and Lilly, had *established* their minimum prices for their trade-marked or trade named products by written contracts with certain of their retailers. (RU, pp. 21, 28; RL, p. 21.) In both of these cases they had, subsequent to the establishment of such minimum prices, given notice to the ap-

pellant of the price which the appellant must pay for using their trademarks or trade names in assisting the appellant in the resale of commodities identified therewith. In both of these cases, with full knowledge of the price they must pay, the appellant not only bought the commodity but also used the appellees' trademarks and trade names in assisting it in the resale of such commodities in complete disregard of the agreement that had been made when it purchased such commodities with notice of this fact. Where the appellant, intentionally or unintentionally, misses the point in these cases lies in the fact that there were not one but two property rights involved. There is the right to the ownership of the commodity *qua* commodity which appellant purchased and with which it could do as it pleased and there is also the right to use the trademark or trade name of appellees which appellant knew it could only use for the price or upon the condition which the owner of that trademark or trade name imposed for its use; namely, the observance of its resale minimum prices. Had appellant been willing to sell the commodity as a commodity without the use of appellees' trademarks and trade names, it was perfectly free to do so under the terms of the contract. Or, having purchased them, it was perfectly free to decide if it did not wish to sell such products and observe the conditions attached to their sale with the trademark and to return them to the appellees. In the latter case, if they were genuinely going out of the business of selling appellees' products, the appellees were required either to repurchase them or to release them from the condition. But appellant desired to have its cake and eat it too. It desired not only to deal with the commodity *qua* commodity but to deal with the trademark and have its assistance in reselling the commodity, thus taking the position that having purchased one right, it got the addi-

tional right without having to pay the price it had by its actions entered into a contract to pay. Therefore, when appellant speaks in its brief of the right of a "remote non-consenting vendee" it is erecting a straw man that doesn't exist. In these cases it was neither remote nor non-consenting. As far as the agreement it made for the use of the trademark, it knew in advance specifically what the price was for the use of that trademark before it purchased the commodity and the trademark. It was not, therefore, remote in its dealings in this respect with the appellees and by its actions it had *consented* and agreed to the terms under which it could use that trademark or trade name.

Clearly, then, analyzed in this light, there are no problems under the United States Constitution presented in these cases that were not clearly present and unanimously decided by this Court in the *Old Dearborn* case. They were also decided, in effect, by this Court as recently as 1961 when this Court dismissed for want of a substantial federal question the appeal in *Standard Drug Co., Inc. v. General Electric Co.;* 368 U. S. 4. In that case a perusal of the grounds presented for jurisdiction by this Court in an appeal from the Supreme Court of Virginia upholding the constitutionality of the Virginia Fair Trade Act covered completely all of the points raised by the appellant in these cases in its Statements of Jurisdiction.

Therefore, it is submitted that this Court can only reverse the decision of the Supreme Court of Ohio and the Court of Appeals of Ohio on constitutional grounds if it is prepared to fly in the face of basic contract principles and, more importantly, to reverse its own unanimous decision in the *Old Dearborn* case. The *Old Dearborn* decision is, we submit, perfectly consonant with all other decisions of this Court, including several cases in which this Court has since that time dismissed for want of a federal

question. Numerous appeals which have been made to this Court on the ground that state fair trade laws were unconstitutional under the United States Constitution have been thus dismissed. To follow the course suggested by appellant would mean a return to the era of decisions in the early 1930's and preceding times when this Court was, justly or unjustly, accused of substituting its own economic predilections disguised as constitutional grounds for setting aside policy decisions arrived at by both state legislatures and the United States Congress. It would mean that competition—even unbridled and unfair competition—was enshrined with a constitutional sanctity. It would mean that in some way the doctrine of Adam Smith was embodied in our Constitution. It would forget that one of the purposes of the Sherman Act itself was the restraint of untrammeled competition.

It is significant that in a recent decision (June 25, 1962) of this Court in the case of *Brown Shoe Co., Inc. v. United States*, 370 U. S. 294 (1962), the Court outlawed a merger, although it admitted in so doing that higher costs and prices to the public might be the result. This Court reasoned that Congress had decided what policy standards should be applied and recognized that it must be bound in the field of competition, as elsewhere, by the policy decision of the Legislature. In this respect the Court said at page 344 of that opinion:

> "* * * A third significant aspect of this merger is that it creates a large national chain which is integrated with a manufacturing operation. The retail outlets of integrated companies, by eliminating wholesalers and by increasing the volume of purchases from the manufacturing division of the enterprise, can market their own brands at prices below those of competing independent retailers. Of course, some of the results of large integrated or chain operations are

beneficial to consumers. Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. *But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.*" (Emphasis added.)

We cite this case as merely illustrating that such policy decisions are still for the Legislature to make even though higher prices might result under the new fair trade law or even though the new law be found inimical to free competition, both of which contentions we do not admit and both of which are in fact contradicted by the evidence in this record.

**F. Constitutional and Unconstitutional Provisions Are Not Inseparably Commingled in the New Ohio Act.**

A ground for the appellant's Statement of Jurisdiction in these cases is "whether the federally unconstitutional provisions of the Ohio Fair Trade Act are so commingled and entwined with the remainder of the Act and so inseparable therefrom as to make the entire act unconstitutional under the federal constitution."

We have already noted that under the facts of these cases appellant cannot point to any particular section which is involved herein which could conceivably be deemed unconstitutional without a reversal of *Old Dearborn*. It must also be noted that Ohio Revised Code Section 1.13 provides as follows:

"Each section of the Revised Code and every part of each section is an independent section and part of a section, and the holding of any section or a part thereof to be unconstitutional, void, or ineffective for any cause does not affect the validity or constitutionality of any other section or part thereof."

In view of this section of the Ohio Revised Code, it is submitted that no argument which appellant makes to the invalidity of some section or portion of a section of the Ohio Fair Trade Act not involved in these cases would justify the Court in sustaining appellant's attempt to invalidate the sections actually in issue by virtue of the facts disclosed by the record in these cases.

**G. The Ohio Fair Trade Act As Applied to the Facts of These Cases Is Clearly Within the Ambit of Permission Granted by the Miller-Tydings or McGuire Act Exemptions to the Operation of the Antitrust Laws.**

Recognition of the same economic problems and their desirability for solution at a state level led the Congress of the United States to enact the enabling legislation contained in the Miller-Tydings amendment to the Sherman Act[1] and the McGuire Act.[2] Both of these statutes had in mind the same idea; that is, to permit price maintenance agreements in interstate commerce when authorized by a state "fair trade" law and to take such legislation out of the operation of the Sherman Act and the other antitrust laws. After the decision of this Court in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384 (1951), which held that state fair trade laws could not apply to a so-called "non-signer," the Congress enacted the McGuire

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[1] 15 U. S. C., Sec. 1, 50 Stat. 693.

[2] 15 U. S. C., Sec. 45(a)(1)-(5), 66 Stat. 632.

Act which made it plain that such laws could apply to a party who had not *signed* any fair trade agreement. The McGuire Act clearly was intended to and did apply to what were called "unfair methods of competition in commerce" and "unfair or deceptive acts of practice in commerce." Its enactment was predicated upon the premise that intra-brand price cutting of a trademarked or trade named product is unfair competition and an unfair practice if done in violation of a fair trade agreement between the manufacturer and a dealer. And the law was also made applicable to anyone who knowingly or willfully violated the terms of any contract or agreement for price maintenance between a manufacturer and a dealer on such products whether or not they were parties to the contract. Further, the McGuire Act not only authorized contracts or agreements prescribing minimum or stipulated prices but contracts "requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices for the resale of such commodities."

A reading of the first four sections of the McGuire Act makes it perfectly evident that what was done under the facts of these cases in the light of the new Ohio Act as applied to those facts was clearly within the provisions of that enabling statute. The pertinent sections are as follows:

> "(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful:
>
> "(2) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark,

brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

"(3) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

"(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce."

A reading of these sections against the background of the facts presented by these cases and the applicable sections of the new Ohio Fair Trade Act would seem to leave no room for doubt that nothing in the Ohio Act as applied to these cases is in any way violative of the Sherman Act.

### H. There Is No Conflict Between the Ohio Fair Trade Act and the Lanham Act or the Federal Food and Drug Act.

In his shotgun attack on the Ohio Fair Trade Act, counsel for the appellant has included arguments that his client could not sell the appellees' products at a discount price by removing the trademarks on those products because such conduct would be a violation of the Federal Food and Drug Act (21 U. S. C., § 331(b), § 352(a)) and the Lanham Act (15 U. S. C., § 1127).

Actually, the appellant does not claim that the provisions of the Lanham Act would be violated if appellant were to sell appellees' products without the assistance of appellees' trademarks and trade names. Rather, counsel for the appellant has conceived an argument that the State of Ohio is powerless to legislate with respect to the proprietary interest in a trademark or trade name because the federal government has pre-empted this field of the law by its enactment of the Lanham Act. Appellant relies on *Time, Inc. v. T. I. M. E. Inc.*, 123 F. Supp. 446, which has no connection whatsoever with the sale of fair-traded commodities at a discount without the use of the trademark or trade name. Counsel for appellant misreads the *Time, Inc.* opinion and fails to bring to this Court's attention the language therein of the district judge for the U. S. Central District Court of California, wherein he states at p. 453:

> "* * * while the cause of action itself arises under and the remedies are provided by federal law, *ownership of the mark itself arises under and is governed by state law,* except to the extent made incontestable under applicable provisions of the Lanham Act. * * *" (Emphasis added.)

Further, the Court therein states at page 453:

> "* * * Ownership of a trade name or a commercial name, 15 U. S. C. A. § 1127, likewise arises under *and is governed by* state law." (Emphasis added.)

Thus, the opinion upon which appellant relies stands as authority for the proposition that a state legislature may recognize and protect rights in a trademark or trade name. Furthermore, the district court judge in the *Time* case, *supra*, was relying upon *Trademark Cases*, *supra*, which clearly establish this proposition.

Nor is the appellant's argument assisted by reference to the cases of *Sunbeam Corporation v. Wentling*, 192 F. 2d 7, and *Sunbeam Corporation v. Payless Drug Stores*, 113 F. Supp. 31. Neither of these cases stands for the proposition that federal statutory law precludes a state from recognizing property rights in a trademark or trade name. In fact, both of these cases cite with approval this Court's opinion in the *Old Dearborn* case, *supra*, which is the basic recognition of the property rights which appellant now seeks to attack. See *Sunbeam Corporation v. Wentling*, 192 F. 2d 7, at page 9, and *Sunbeam Corporation v. Payless Drug Stores*, 113 F. Supp. 31, at page 44. Further, counsel for appellant fails to mention that *Sunbeam v. Wentling* was simply a holding following the decision of this Court in *Schwegmann Brothers v. Calvert Distillers*, 341 U. S. 384 (1951) to the effect that the non-signer provisions of a state fair trade act did not come within the Miller-Tydings Amendment. The *Sunbeam* case was decided prior to enactment of the McGuire Act which does permit such state legislation. Naturally, counsel for the appellant fails to note that subsequent to the McGuire Act all of such questions as raised in the *Sunbeam* case have been laid to rest by the federal judiciary.

Counsel for appellant next makes the point that the removal of the appellees' trademarks or trade names would be a tortious and an unlawful removal of labels from drugs in commerce. Apparently, appellant is suggesting that if it were to remove the Eli Lilly label, for example, from a drug and replace that label with its own brand name clearly indicating thereon the chemical ingredients of the drug, this would constitute some violation of the law. The very sections of the Federal Food and Drug Act cited in appellant's brief demonstrate the preposterous nature of this argument. Section 352(b)(1), 21 U. S. C., requires only that a drug bearing a label designate the name and place of business of the manufacturer, packer or distributor. Clearly, the law does not require designation of all three. If appellant does not wish to use the manufacturer's trademark or trade name, it would be assumed that it would be willing to label the commodity with its own trademark or trade name and accordingly there could be no violation. Further, if the label identifies the ingredients of the drug (or whatever other item may be involved), then the label certainly could not be held to be false or misleading.

It is submitted that the appellant does, in fact, distribute numerous drugs under its own brand name and knows full well that there is no violation of any law simply because the manufacturer of these items is not identified on the label. It is not difficult to cut through the superficial position in which appellant places itself. Appellant has no intention nor desire whatsoever to sell Eli Lilly, Upjohn or any other trademarked products without utilizing these trademarks in the sale. In fact, it is the trademark that appellant most desires in order to further its business schemes. Rather than conceive imaginary ways

in which appellant might be violating the appellees' rights and expressing pretended concern for the appellees, counsel for the appellant might do well to recognize the fact that this very case arises simply because the appellant is in admitted and flagrant violation of the statutory law of Ohio.

Finally, even if the cited federal statutes were construed to make the conduct of a retailer in relabeling branded merchandise a tort, it is clear that the appellees herein and any other manufacturers desiring to fair trade their merchandise waive any rights they may claim in this respect. The Ohio Fair Trade Act states that the retailer may sell branded merchandise at any price if the brand is removed. When the trademark owner decides to take advantage of the Fair Trade Act, clearly he consents to all of the provisions of the Act, including this one. It is inconceivable that counsel for the appellant thinks for one moment that his client would be in violation of any law were it to sell branded merchandise at a cut-rate price without the use of the appellees' brand names.

## V. CONCLUSION.

It has not been the purpose of this brief to elaborate at length on the advantages to our economy and political system of preserving the small independent businessmen, such as the hardware dealer, as a part of the fabric of our society. The Legislature concluded that this is important to the general welfare and that the discouragement of monopoly in retailing is vital to the general welfare. Whether or not the Court agrees or disagrees with this conclusion, it cannot be denied that in view of the evidence presented to it, this is at least a *possible* and *logical*

one. This alone is sufficient to bring this legislation within the ambit of the power and right of the General Assembly to enact this legislation in the promotion of the general welfare. Not only is the concern of the Legislature for the protection of the consuming public from the dangers of monopoly in retailing quite properly within the meaning of general welfare, but also it certainly is just as proper for the Legislature to consider the economic climate necessary to protect small business from extinction as it is to concern itself with the minimum wages to protect labor, price supports to support the farmers, and the varieties of other legislation in which the Legislature has been required to make a determination among competing interests and to balance those interests in promoting the public welfare.

In addition, as even a cursory reading of the transcript of the hearings before both the House and Senate of the Ohio Legislature prior to passage of this Act will make clear, the Legislature was concerned with the threat to the public which the growth of giant retail monopolies would bring about. The Legislature also expressed a very proper concern for the protection of the trademarks and trade names of those small and medium-sized manufacturers who through the production of quality goods and widespread public advertising of such goods developed good will in those trademarks and trade names and a property right quite aside from the commodities themselves. The Legislature felt these interests should be protected against parties who would unscrupulously destroy that good will for their own, rather than the owner's, benefit.

It is submitted that all appellant's arguments come down to a disagreement with this position by the Legis-

lature of the State of Ohio. Having lost that battle before the Legislature, appellant is now asking this Court to reverse *Old Dearborn* and to endow with constitutional sanctity its own conception of what the law should be. It is submitted that this Court should not and will not follow appellant's suggestion.

Respectfully submitted,

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